

paragraphs (a)(3) and (a)(7) of this section, shall apply; in addition, such information will not be made available if it is likely to have any of the effects described in 5 U.S.C. 552b (c)(5), (c)(9), or (c)(10).

(c) Under section 10 of the Federal Trade Commission Act, any officer or employee of the Commission who shall make public any information obtained by the Commission, without its authority, unless directed by a court, shall be deemed guilty of a misdemeanor, and upon conviction thereof, may be punished by a fine not exceeding five thousand dollars (\$5,000), or by imprisonment not exceeding 1 year, or by fine and imprisonment, in the discretion of the court.

(d) Except as provided in paragraphs (f) and (g) of this section and in § 4.11 (b), (c), and (d), no material which is marked or otherwise identified as confidential and which is within the scope of § 4.10(a)(8) and no material which is within the scope of § 4.10(a)(9) which is not otherwise public shall be made available to any individual other than a duly authorized officer or employee of the Commission or a consultant or contractor retained by the Commission who has agreed in writing not to disclose the information without the consent of the person who produced the material. All other Commission records may be made available to a requester under the procedures set forth in § 4.11 or may be disclosed by the Commission except where prohibited by law.

(e) Except as provided in paragraphs (f) and (g) of this section and in § 4.11 (b), (c), and (d), material not within the scope of § 4.10(a)(8) or § 4.10(a)(9) which is received by the Commission and is marked or otherwise identified as confidential may be disclosed only if it is determined that the material is not within the scope of § 4.10(a)(2), and only if the submitter is provided at least 10 days' notice of the intent to disclose the material involved.

(f) Nonpublic material obtained by the Commission may be disclosed to persons other than the submitter in connection with the taking of oral testimony without the consent of the submitter only if the material or transcript is not within the scope of

§ 4.10(a)(2). If the material is marked confidential, the submitter will be provided 10 days' notice of the intended disclosure or will be afforded an opportunity to seek an appropriate protective order.

(g) Material obtained by the Commission:

(1) Through compulsory process or voluntarily in lieu thereof, and protected by sections 21 (b) and (f) of the Federal Trade Commission Act, 15 U.S.C. 57b–2 (b), (f), and 4.10(d) of this part; or

(2) That is designated by the submitter as confidential, and protected by section 21(c) of the Federal Trade Commission Act, 15 U.S.C. 57b–2(c), and § 4.10(e) of this part; or

(3) That is confidential commercial or financial information protected by section 6(f) of the Federal Trade Commission Act, 15 U.S.C. 46(f), and § 4.10(a)(2) of this part, may be disclosed in Commission administrative or court proceedings subject to Commission or court protective or *in camera* orders as appropriate. See §§ 1.18(b) and 3.45.

Prior to disclosure of such material in a proceeding, the submitter will be afforded an opportunity to seek an appropriate protective or *in camera* order. All other material obtained by the Commission may be disclosed in Commission administrative or court proceedings at the discretion of the Commission except where prohibited by law.

(15 U.S.C. 41 *et seq.*)

[38 FR 1731, Jan. 18, 1973, as amended at 40 FR 7629, Feb. 21, 1975; 40 FR 23278, May 29, 1975; 42 FR 13540, Mar. 11, 1977; 46 FR 26291, May 12, 1981; 49 FR 30166, July 27, 1984; 54 FR 7399, Feb. 21, 1989; 57 FR 10807, Mar. 31, 1992; 60 FR 37749, July 21, 1995]

§ 4.11 Disclosure requests.

(a) *Freedom of Information Act requests*—(1) *Initial requests*—(i) *Form and contents; time of receipt.* (A) A request under the provisions of the Freedom of Information Act, 5 U.S.C. 552, as amended, for access to Commission records shall be in writing and addressed as follows:

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Freedom of Information Act Request, Office of the Deputy Executive Director for Planning and Information, Federal Trade Commission, 6th Street and Pennsylvania Avenue, NW., Washington, DC 20580.

(B) Failure to mark the envelope and the request in accordance with paragraph (a)(1)(i)(A) of this section will result in the request being treated as received on the date the request is actually received by the processing unit in the Office of the Deputy Executive Director for Planning and Information.

(C) *Costs; agreement to pay costs.* Requesters will be charged search and duplication costs prescribed by Rule 4.8 for requests under this section. All requests shall include a statement of the information needed to determine fees, as provided by § 4.8(c), and an agreement to pay fees (or a statement that the requester will not pay fees if a fee waiver is denied), as provided by § 4.8(d). Requests may also include an application for a fee waiver, as provided by § 4.8(e). An advance payment may be required in appropriate cases as provided by § 4.8(h).

(D) *Failure to agree to pay fees.* If a request does not include an agreement to pay fees, and if the requester is notified of the estimated costs pursuant to Rule 4.8(d)(3), the request will be deemed not to have been received until the requester agrees to pay such fees. If a requester declines to pay fees and is not granted a fee waiver, the request will be denied.

(E) *Records for sale at another government agency.* If requested materials are available for sale at another government agency, the requester will not be provided with copies of the materials but will be advised to obtain them from the selling agency.

(ii) *Identifiability.* (A) A request for access to Commission records must reasonably describe the records requested to enable Commission personnel to identify and locate them with a reasonable amount of effort. A request should be as specific as possible, and include, where known, information regarding dates, titles, file designations, location, and any other information which may assist the Commission in identifying and locating the records requested.

(B) A denial of a request may state that the description required by paragraph (a)(1)(ii)(A) of this section is insufficient to allow identification and location of the records.

(iii) *Time limit for initial determination.* (A) The Deputy Executive Director for Planning and Information or the Director of the Information Services Division shall, within ten (10) working days of the receipt of a request, either grant or deny, in whole or in part, such request.

(B) The Deputy Executive Director for Planning and Information or the Director of the Information Services Division may extend this time limit by not more than ten working days if such extension is:

(1) Necessary for locating records or transferring them from physically separate facilities; or

(2) Necessary to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are sought in a single or series of closely related requests; or

(3) Necessary for consultation with another agency having a substantial interest in the determination, or for consultation among two or more components of the Commission having substantial subject matter interest therein.

(C) If the Deputy Executive Director for Planning and Information or the Director of the Information Services Division extends the time limit for initial determination pursuant to paragraph (A)(1)(iii)(B), the requester shall be notified in accordance with 5 U.S.C. 552(A)(6)(B).

(D) If a request is not granted within the time limits set forth in paragraphs (a)(1)(iii) (A) and (B) of this section, the request shall be deemed to be denied and the requesting party may appeal such denial to the General Counsel in accordance with paragraph (a)(2) of this section.

(iv) *Initial determination.* (A) The Deputy Executive Director for Planning and Information or the Director of the Information Services Division shall grant access to requested records, or any portions thereof, that must be made available under the Freedom of Information Act. He shall deny access to records that are exempt under the

Freedom of Information Act (5 U.S.C. 552(b)), unless he determines that such records fall within a category the Commission or the General Counsel has previously authorized to be made available to the public as a matter of policy. Denials shall set forth the reasons therefore and advise the requester that this determination can be appealed to the General Counsel either because the requester believes the records are not exempt, or because the requester believes the General Counsel should exercise his discretion to release such records notwithstanding their exempt status.

(B) The Deputy Executive Director for Planning and Information or the Director of the Information Services Division is deemed to be the sole official responsible for all denials of initial requests, except denials to materials contained in active investigatory files in which case the Director or Deputy Director of the Bureau or the Director of the Regional Office responsible for the investigation shall be the responsible official.

(C) Records to which access has been granted will be made available to the requester and will remain available for inspection and copying for a period not to exceed thirty days from date of notification to the requester unless the requester asks for and receives the consent of the Deputy Executive Director for Planning and Information or the Director of the Information Services Division to a longer period. Records assembled pursuant to a request will remain available only during this period and thereafter will be refiled. Appropriate fees may again be imposed for any new or renewed request for the same records.

(D) If a requested record cannot be located from the information supplied, or is known to have been destroyed or otherwise disposed of, the requester shall be so notified.

(2) *Appeals to the General Counsel from initial denials*—(i) *Form and contents; time of receipt.* (A) If an initial request for records is denied in its entirety, the requester may, within 30 days of the date of the determination appeal such denial to the General Counsel. If an initial request is denied in part, the time for appeal shall not expire until 30 days

after the date of the letter notifying the requester that all records to which access has been granted have been made available. The appeal shall be in writing and should include a copy of the initial request and a copy of the response to that initial request, if any. The appeal shall be addressed as follows:

Freedom of Information Act Appeal, Office of the General Counsel, Federal Trade Commission, 6th Street and Pennsylvania Avenue, NW., Washington, DC 20580.

(B) Failure to mark the envelope and the appeal, in accordance with paragraph (a)(2)(i)(A) of this section, will result in the appeal being treated as received on the date the appeal is actually received by the Office of the General Counsel.

(C) Each appeal to the General Counsel which requests him to exercise his discretion to release exempt records shall set forth the interest of the requester in the subject matter and the purpose for which the records will be used if the request is granted.

(ii) *Time limit for appeal.* (A) The General Counsel shall, within twenty (20) working days of the receipt of an appeal, either grant or deny the appeal, in whole or in part.

(B) The Commission or the General Counsel may, by written notice to the requester in accordance with 5 U.S.C. 552(a)(6)(B), extend the time limit for deciding an appeal by not more than ten (10) working days for the reasons set forth in paragraph (a)(1)(iii)(B) of this section, provided that the amount of any extension utilized during the initial consideration of the request under that subsection shall be subtracted from the amount of additional time otherwise available.

(iii) *Determination of appeal.* (A) The General Counsel shall have the authority to grant or deny all appeals and to release as an exercise of discretion records exempt from mandatory disclosure under 5 U.S.C. 552(b). In unusual or difficult cases he may, in his sole discretion, refer an appeal to the Commission for determination. A denial of an appeal in whole or in part shall set forth the basis for the denial, and shall advise the requester that judicial review of the decision is available either in the district in which the requester

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resides or has a principal place of business, in the district in which the agency records are situated, or in the District of Columbia.

(B) The General Counsel shall be deemed solely responsible for all denials of appeals, except where an appeal is denied by the Commission. In such instances, the Commission shall be deemed solely responsible for the denial.

(b) *Requests from congressional committees and subcommittees.* Requests from congressional committees and subcommittees for nonpublic material shall be referred to the General Counsel for presentation to the Commission, subject to the provisions in 5 U.S.C. 552(c) and FTC Act 21(b) that neither the Freedom of Information Act, 5 U.S.C. 552, nor the Federal Trade Commission Act, 15 U.S.C. 41, *et seq.*, is authority to withhold information from Congress. Upon receipt of a request from a congressional committee or subcommittee, notice will be given to the submitter of any material marked confidential, or any material within the scope of § 4.10(a)(9), that is responsive to the request that the request has been received. No other notice need be provided prior to granting the request. The Commission will inform the committee or subcommittee that the submitter considers such information confidential.

(c) *Requests from Federal and State law enforcement agencies.* Requests from law enforcement agencies of the Federal government shall be addressed to the liaison officer for the requesting agency, or if there is none, to the General Counsel. Requests from state agencies shall be addressed to the General Counsel. With respect to requests under this paragraph, the General Counsel or the appropriate liaison officer is delegated the authority to dispose of them or may refer them to the Commission for determination, except that requests must be referred to the Commission for determination where the Bureau having the material sought and the General Counsel do not agree on the disposition. Prior to granting access under this section to any material submitted to the Commission, the General Counsel or liaison officer will obtain from the requester a certification that

such information will be maintained in confidence and will be used only for official law enforcement purposes. The certificate will also describe the nature of the law enforcement activity and the anticipated relevance of the information to that activity. A copy of the certificate will be forwarded to the submitter of the information at the time the request is granted unless the agency requests that the submitter not be notified.

(d) *Requests from Federal and State agencies for purposes other than law enforcement.* Requests from Federal and State agencies for access not related to law enforcement should be addressed to the General Counsel. Disclosure of nonpublic information will be made consistent with sections 6(f) and 21 of the FTC Act. Requests under this section shall be subject to the fee and fee waiver provisions of § 4.8.

(e) *Material and information requested by subpoena in cases or matters to which the agency is not a party.* (1) The procedures specified in this section will apply to all subpoenas directed to Commission employees, except special government employees, that relate in any way to the employees' official duties. These procedures will also apply to subpoenas directed to former Commission employees and current or former special government employees of the Commission, if the subpoenas seek nonpublic materials or information acquired during Commission employment. The provisions of paragraph (e)(3) of this section will also apply to subpoenas directed to the agency. For purposes of this section, the term *subpoena* includes any compulsory process in a case or matter to which the agency is not a party; the term *nonpublic* includes any material or information which, under § 4.10, is not required to be made public; the term *employees*, except where otherwise specified, includes "special government employees" and other agency employees; and the term *special government employees* includes consultants and other employees as defined by section 202 of title 18 of the United States Code.

(2) Any employee or former employee who is served with a subpoena shall promptly advise the General Counsel of the service of the subpoena, the nature

of the material or information sought, and all relevant facts and circumstances.

(3) A party causing a subpoena to be issued to the Commission or any employee or former employee of the Commission shall furnish a statement to the General Counsel. The statement shall set forth the party's interest in the case or matter, the relevance of the desired testimony or material, and a discussion of whether it is reasonably available from other sources. If testimony is desired, the statement shall also contain a general summary of the testimony and a discussion of whether agency records could be produced and used in its place. Any authorization for testimony will be limited to the scope of the demand as summarized in such statement.

(4) Absent authorization from the General Counsel, the employee or former employee shall respectfully decline to produce requested material or to disclose requested information. The refusal should be based on this paragraph and on *Touhy v. Ragen*, 340 U.S. 462 (1951).

(5) The General Counsel will consider and act upon subpoenas under this section with due regard for statutory restrictions, the Commission's rules and the public interest, taking into account factors such as the need to conserve the time of employees for conducting official business; the need to avoid spending the time and money of the United States for private purposes; the need to maintain impartiality between private litigants in cases where a substantial government interest is not involved; and the established legal standards for determining whether justification exists for the disclosure of confidential information and material.

(f) Requests by current or former employees to use nonpublic memoranda as writing samples shall be addressed to the General Counsel. The General Counsel is delegated the authority to dispose of such requests consistent with applicable nondisclosure provisions, including sections 6(f) and 21 of the FTC Act.

(g) Employees are encouraged to engage in teaching, lecturing, and writing that is not prohibited by law, Executive order, or regulation. However, an

employee shall not use information obtained as a result of his Government employment, except to the extent that such information has been made available to the general public or will be made available on request, or when the General Counsel gives written authorization for the use of nonpublic information on the basis that the use is in the public interest.

(15 U.S.C. 41 *et seq.*)

[40 FR 7629, Feb. 21, 1975, as amended at 42 FR 13820, Mar. 14, 1977; 43 FR 5802, Feb. 10, 1978; 46 FR 26292, May 12, 1981; 48 FR 4280, Jan. 31, 1983; 49 FR 20279, May 14, 1984; 49 FR 21048, May 18, 1984; 50 FR 53306, Dec. 31, 1985; 55 FR 29839, July 23, 1990; 57 FR 10807, Mar. 31, 1992; 58 FR 15764, Mar. 24, 1993; 60 FR 37750, July 21, 1995]

§ 4.12 Disposition of documents submitted to the Commission.

(a) *Material submitted to the Commission.* (1) Any person who has submitted material to the Commission may obtain, on request, the return of material submitted to the Commission which has not been received into evidence:

(i) After the close of the proceeding in connection with which the material was submitted; or

(ii) When no proceeding in which the material may be used has been commenced within a reasonable time after completion of the examination and analysis of all such material and other information assembled in the course of the investigation.

(2) Such request shall be in writing, addressed to the custodian designated pursuant to § 2.16 or the Secretary of the Commission in all other circumstances, and shall reasonably describe the material requested. A request for return of material may be filed at any time, but material will not be returned nor will commitments to return material be undertaken prior to the time described in this paragraph.

(b) *Commission-made copies of documents submitted to the Commission.* The Commission will not return to the submitter copies of documents made by the Commission unless, upon a showing of extraordinary circumstances, the Commission determines that return would be required in the public interest.